



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Rotair Industries, Inc.

File: B-224332.2; B-225049

Date: March 3, 1987

DIGEST

Agency process to approve alternate sources for helicopter spare parts was inconsistent with the statutory and regulatory provisions calling for "prompt" qualification procedures to the extent of depriving the protester of a reasonable opportunity to compete where in certain cases the agency had yet to act on source approval requests submitted by the protester two years earlier.

DECISION

Rotair Industries, Inc. protests the awards or proposed awards of sole-source contracts for the supply of helicopter spare parts to United Technologies Corporation, Sikorsky Aircraft Division (Sikorsky), under various solicitations issued by the Department of the Army, Aviation Systems Command (AVSCOM). The gravamen of Rotair's protest is the assertion that AVSCOM's source approval process is unreasonably long and, therefore, has served to preclude the firm from an opportunity to compete for items it is technically capable of furnishing. Rotair also claims the recovery of its costs of filing and pursuing the protest, including attorney's fees, and its proposal preparation costs. We sustain the protest.

PROTEST BACKGROUND

Sikorsky is the original manufacturer of the helicopter types for which the items in question are being procured. For many items, Sikorsky has been the only approved source of supply and, accordingly, has been awarded various contracts for spare parts on a sole-source basis.

Rotair has actively sought to compete for helicopter spare parts contracts and has submitted requests to AVSCOM that it be approved as a source for the items. In many instances,

038196

Rotair has been approved in response to its request and has received a contract, but the firm complains that AVSCOM's overall process, which involves the evaluation of a potential source's submitted technical data for qualification purposes, has become unreasonably long to the extent that AVSCOM has had to award sole-source contracts to Sikorsky on an emergency basis. According to Rotair, this is so because the agency had yet to approve Rotair as a source by the time the inventory of the part item in question was becoming exhausted, even though the agency originally may have delayed the making of any award in order to give Rotair the opportunity to qualify.

Hence, Rotair argues that AVSCOM's delay in processing its requests not only violates the applicable procurement law and regulation governing the qualification of new sources, but also, by effectively precluding Rotair's right to compete, is inconsistent with the overriding mandate of the Competition in Contracting Act of 1984 (CICA) that military agencies obtain "full and open" competition in their procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (Supp. III 1985).

ANALYSIS

As provided by 10 U.S.C. § 2319(b)(6), as added by the Defense Procurement Reform Act of 1984, Pub. L. No. 98-525, Oct. 19, 1984, 98 Stat. 2593, an agency imposing a qualification requirement--that is, a requirement for testing or other quality assurance demonstration that must be satisfied by a prospective offeror or its product in order to become qualified for an award--must ensure that an offeror seeking qualification is "promptly" informed as to whether qualification has been obtained and, if not, "promptly" furnished specific information why qualification was not attained. This statutory provision is mirrored in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.202(a)(4) (1986).

To the extent Rotair argues that AVSCOM's source approval process has not been "prompt" within the meaning of the statute and implementing regulation, we agree. The record shows that, in several instances, Rotair submitted its source approval requests to AVSCOM more than a year prior to the agency's ultimate sole-source procurement actions, but AVSCOM still had not completed the qualification procedures at the time those actions were taken. For example, Rotair has submitted evidence concerning 10 separate sole-source awards

to Sikorsky which indicates that the firm's source approval requests had been pending from 6 to 17 months without result when the awards were made.

The agency contends that several factors, however, have caused the qualification process to be extended. Of these, AVSCOM states that the most important consideration is flight safety. Because the helicopter types in question recently have been subject to serious and even catastrophic mechanical failures, the agency has added numerous helicopter spare parts items to its Flight Safety Parts List (FSPL) in an effort to reduce these failures by establishing better quality assurance controls over vendor sources. According to AVSCOM, this has had the effect of "freezing the prequalification of sources" until more detailed criteria concerning manufacturing processes can be developed.

Secondly, AVSCOM asserts that another major reason for any delays in qualifying Rotair as a source for various procurements has been Rotair's consistent failure to include with its initial source approval request the requisite complete technical data on the part being procured. According to AVSCOM, its policy has not been to return the source approval request to Rotair without action, but to go back to the firm for the needed data or to attempt to obtain it from AVSCOM's own resources. AVSCOM urges that Rotair's failure to submit full data, as well as the "sheer volume" of Rotair's source approval requests and their timing (it appears that Rotair often submits its approval requests only upon synopsis of a particular requirement) has caused considerable delays in qualifying Rotair as an approved source. Thus, AVSCOM contends that the circumstances clearly show that its process has not been unreasonably long.

It has been our consistent view that when a contracting agency restricts a contract award to an approved source, it must give nonapproved sources a reasonable opportunity to qualify. Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2. A protester's mere allegation that the agency's procedure for approving alternate products or sources take more time than the protester believes is necessary, however, is not a showing that the procedures fail to provide that reasonable competitive opportunity. See JGB Enterprises, Inc., B-218430, Apr. 26, 1985, 85-1 CPD ¶ 479.

Here, we have extensively reviewed the administrative record and given due consideration to AVSCOM's asserted reasons why certain Rotair source approval requests may have been

delayed. We recognize AVSCOM's flight safety concerns and Rotair's failure to submit complete technical data in all cases, but our overall view of the agency's qualification process is simply that it has been unreasonable in length. In this regard, not all of the items at issue in this protest are FSPL-restricted parts, nor does the record indicate that, in each and every case, Rotair was dilatory or furnished inadequate technical data. We note that solicitation No. DAAJ09-86-Q-6066 was synopsized more than a year after Rotair had submitted its source approval request for the item in question in May 1985. From the record, it appears that AVSCOM never requested additional data from Rotair nor placed the item on the FSPL. The agency has responded that Rotair's request has not been finally processed because the item remains in the product assurance review stage. However, since flight safety and data concerns are not evident here, this is not an adequate reason to explain why AVSCOM has not completed the source approval process for this item after a 22-month period.

Moreover, we find support for Rotair's contention that, in certain instances, the agency did not seek additional data from the firm until many months after its initial source approval request had been filed. For example, under solicitation No. DAAJ09-85-R-A230, calling for a non-FSPL item, Rotair submitted its source approval request at the end of 1984, but AVSCOM did not request additional data from the firm as to the casting and machining sources of the item until some six months later, and the agency does not seem to have made any further requests for information necessary to complete the source approval process until the middle of 1986. Hence, although more than two years have passed since Rotair initially submitted its request, the firm has yet to qualify for the item or be informed why qualification was not obtained.

Recently, we held that the passage of 16 months between the submission of an offer for an alternate product and the award of the contract to another firm was unreasonable, since this delay was due to the agency's lack of advance planning and its failure to consider whether the alternate product could be evaluated by such means as first article testing. Freund Precision, Inc., B-223613, Nov. 10, 1986, 66 Comp. Gen. _____, 86-2 CPD ¶ 543. Although not directly on point, Freund is useful here to reflect our concern that AVSCOM could have done more to enhance the timeliness of its qualification process. As noted above, certain source approval requests submitted by Rotair are still pending more than two years after having been submitted. Although Rotair must bear

responsibility for those instances in which it may have failed to furnish full technical data, see Rotair Industries, Inc., B-219994, Dec. 18, 1985, 85-2 CPD ¶ 683, at the same time our review fairly suggests that AVSCOM was not as diligent as it could have been in obtaining necessary additional data from Rotair so as to be able to finalize in a timely fashion the source approval process. Thus, we believe that AVSCOM's source approval procedures, as generally effected, did not provide Rotair with a reasonable opportunity to qualify as an approved source for numerous items. Vac-Hyd Corp., 64 Comp. Gen. 658, supra.

Since the filing of the agency's administrative report on the protest and Rotair's subsequent comments on the report, AVSCOM has submitted a supplemental report which, although rebutting various assertions made by Rotair in its comments on the earlier report,^{1/} nonetheless indicates that AVSCOM is cognizant of certain flaws in its source approval process and is taking steps to improve those procedures. For example, AVSCOM states that the key activity in the process--Breakout Engineering--will be moved to the Competition Advocate's office from the Directorate of Engineering. According to AVSCOM, the net effect will be a shortening of the source approval request cycle because there will be less need for specialized review. Moreover, especially pertinent to the facts here, AVSCOM states that the FSPL program has been clarified so that there can be a faster processing of various source approval requests, and further states that delays occasioned by the submission of incomplete data by potential offerors will be minimized since source approval requests received with incomplete documentation will be returned without processing.

Although we commend the agency's present actions, our decision here does not turn on the fact the Army may now be taking steps to improve its procedures, but rather whether those procedures as previously implemented with respect to Rotair were consistent with the applicable provisions governing the qualification of new products and sources and whether those procedures gave Rotair a reasonable opportunity to qualify. Since we have found otherwise, we are compelled to sustain the protest and recommend corrective action to the extent feasible in the circumstances.


^{1/} Consideration will not be given to legal arguments raised by the agency for the first time in this supplemental report because the submission of a supplemental report in response to a protester's comments on the original report is not contemplated by our Bid Protest Regulations. 4 C.F.R. § 21.3(c) (1986).

Accordingly, by separate letter of today, we are recommending to the Secretary of the Army that, to the extent consistent with inventory requirements and flight safety concerns, AVSCOM refrain from awarding any parts items for which a Rotair source approval request is still pending until the activity, with reasonable promptness, either qualifies Rotair or advises the firm what steps must be taken to obtain qualification. We further recommend that the activity continue its efforts to improve its procedures so that they more closely conform to 10 U.S.C. § 2319(b)(6) and the FAR, 48 C.F.R. § 9.202(a)(4), supra.

Rotair has also claimed the recovery of its costs of filing and pursuing the protest, including attorney's fees, and also its proposal preparation costs. See 4 C.F.R. §§ 21.6(d) and (e) (1986). We allow Rotair the recovery of its protest costs because we believe that the firm's action in filing this protest against its unreasonable exclusion from several procurements will result in improvements in the AVSCOM source approval procedures so that greater competition can be achieved consistent with the overall mandate of CICA, 10 U.S.C. § 2304(a)(1)(A), supra, and future sole-source awards limited or avoided. See AT&T Information Systems, Inc., B-223914, Oct. 23, 1986, 66 Comp. Gen. _____, 86-2 CPD ¶ 447; Freund Precision, Inc., B-223613, supra. Although we recognize that Rotair in certain instances may have been less than thorough with respect to the technical data submitted with various source approval requests, we do not believe the record establishes that the firm contributed to the unreasonable length of AVSCOM's source approval process to the extent that it should be precluded from recovering its protest costs. Cf. Temps & Co.--Claim for Costs, B-221846.2, Aug. 28, 1986, 65 Comp. Gen. _____, 86-2 CPD ¶ 236 (protest costs disallowed where protester lost opportunity to compete for improperly awarded basic contract by delaying the protest).

However, we do not allow Rotair the recovery of its claimed proposal preparation costs. By "proposal," Rotair apparently means its source approval requests, and we do not believe that the costs of such are embraced by our Bid Protest Regulations, which rather concern the recovery of the costs of preparing either sealed bids under an invitation for bids or competitive proposals under a negotiated procurement. 4 C.F.R. § 21.6(d)(2).

The protest is sustained.

for 
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